

JOHN M. KAHENY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
CASEY G. WINN  
ASSISTANT CITY ATTORNEYS

KELLY J. SALT  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**John W. Witt**  
CITY ATTORNEY

CIVIL DIVISION  
202 "C" STREET  
SAN DIEGO, CALIFORNIA 92101-3863  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**MEMORANDUM OF LAW**

**CONFIDENTIAL**  
**ATTORNEY/CLIENT**  
**COMMUNICATION**

**DATE:** August 6, 1996  
**TO:** Jack McGrory, City Manager  
**FROM:** City Attorney  
**SUBJECT:** Exempting Housing Trust Fund Projects From Water and Sewer Capacity Charges

**Questions Presented**

On June 25, 1996, the City Council inquired whether projects receiving Housing Trust Fund monies could be exempted from paying water and sewer capacity charges (collectively "capacity charges"). The Council further inquired whether such projects could pay a nominal fee if they could not be exempted from paying the capacity charges. Finally, the Council asked whether a motion by Councilmember Vargas to initiate such an exemption be brought before Council for consideration in connection with another agenda item.

**Short Answers**

As presently proposed, state law, the San Diego Municipal Code ("SDMC"), the San Diego City Charter ("Charter") and bond covenants prohibit the City from either waiving capacity charges or charging a nominal fee for capacity charges for Housing Trust Fund projects. The motion by Councilmember Vargas was improperly noticed and may not return to Council for consideration unless a new City Manager action is initiated to bring it back to the City Council.

**Background**

On June 24, 1996, the City Council heard Item 202 relating to establishing new rates for capacity charges. The Council approved the item thereby establishing a sewer capacity charge of two thousand five hundred dollars (\$2,500) per single-family dwelling unit and a water capacity charge of two thousand five hundred dollars (\$2,500) per single-family dwelling unit. They further approved a minimum water capacity charge of one thousand five hundred dollars (\$1,500) per equivalent family dwelling unit for: (1) affordable housing units, (2) new residential construction in City approved Redevelopment Areas, and

(3) commercial and industrial enterprises which meet certain criteria. The same rate was also approved for sewer capacity charges on such projects. See attached Resolution No. R-287543.

On June 25, 1996, the City Council heard Item 203 relating to funding for the Housing Trust Fund. Councilmember Harry Mathis moved to approve the City Manager's recommendation as set forth in City Manager Report No. 96-129. Councilmember Juan Vargas moved to amend the motion to include either an exemption from capacity charges for Housing Trust Fund projects or the establishment of a nominal fee for such projects. The Council was advised by Head Deputy City Attorney Harold Valderhaug that Mr. Vargas' amendment could not be considered by the Council inasmuch as it had not been properly noticed pursuant to the Brown Act. Mr. Valderhaug believed Item 202 from the June 24, 1996 hearing was passed by an ordinance and would be coming back to the Council in two weeks for its second reading. Hence, he further advised the Council that the issue could be considered by the Council when it heard the second reading on Item 202. This memorandum will first address whether Councilmember Vargas' motion was proper, and second whether the Council may waive capacity charges or establish a nominal fee for capacity charges.

### Analysis

#### I. Effectiveness of Councilmember Vargas' Motion

Mr. Valderhaug was correct that Mr. Vargas' motion could not be considered by the Council because it had not been properly noticed. Pursuant to California Government Code section 54954.2, a legislative body must post an agenda at least seventy-two (72) hours in advance of a regular meeting. The agenda must contain a brief general description of each item to be transacted or discussed at the meeting. "No action or discussion shall be undertaken on any item not appearing on the posted agenda, except members of a legislative body or its staff may briefly respond to statements made or questions posed. . . ." Cal. Gov't Code § 54954.2.

In the instant case, Item 203 of the agenda did not notice any discussion regarding an exemption from capacity charges or establishment of a nominal fee for capacity charges for Housing Trust Fund projects. Consequently, Mr. Vargas' motion was ineffective. Moreover, consideration of this issue as it relates to Item 202 will not be returning to Council since Item 202 was not passed by an ordinance but by a resolution.

II. Capacity Charges May Not Be Waived Nor May a Nominal Fee be Established for Capacity Charges

A. Municipal Code and State Law Provisions

A capacity charge is a one-time charge for a new, additional, or larger connection to the City's water and sewer systems. The charge is imposed for both the right to connect to the existing systems as well as for the need to provide for existing and new facilities which will benefit the property being connected.

SDMC section 67.72 provides that a capacity charge "shall be paid when any person, firm, corporation or other entity shall request a new water connection or in any way cause an increase in the water usage by the addition of any type of dwelling, commercial or industrial unit. . . ." (Emphasis added.) This charge is due and payable at the time the building permit fees or water connection fees are paid. SDMC section 64.0410 has similar provisions regarding capacity charges for a new, additional or larger sewer connection, or a connection which in any other way increases the flow of sewage into the system. These Municipal Code provisions fully comport with the provisions of the California statutory provisions governing capacity charges.

California Government Code section 66013 authorizes local agencies to impose capacity charges and establishes the parameters for setting the rates. Section 66013 provides:

(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed . . . .

(3) "Capacity charges" means charges for facilities in existence at the time the charge is imposed or charges for new facilities to be constructed in the future which are of benefit to the person or property being charged.

Cal. Gov't Code § 66013 (emphasis added).

Our office has previously opined that this provision of the Government Code expressly limits the use of capacity charges to

the "cost of providing the service." This and other related provisions (see Cal. Gov't Code §§ 66001 et seq.) restrict the use of capacity charges for only capital expansion, thereby ensuring that ratepayers are charged only for the capital expansion attributable to them. Thus, to the extent that any waiver or nominal charge is contemplated for one ratepayer, the charge becomes vulnerable to attack by other ratepayers who must pay a higher charge. The ratepayers paying the higher charge may argue that they are paying for services beyond that attributable to their discharges. Memorandum of Law 95-49, dated July 26, 1995; Memorandum of Law 93-29, dated March 12, 1993.

#### B. Charter Restrictions and Bond Covenants

Even assuming that a complete exemption or establishment of a nominal capacity charge for Housing Trust Fund projects meets the requirements of the above referenced Government Code provisions, such exemption or nominal charge may be prohibited by the Charter. Additionally, existing bond covenants have express restrictions on the collection of sewer rates and charges.

Charter section 53 has consistently been construed to require an independent Water Utility that is wholly dependent upon its revenues for the operation, maintenance, and expansion of its facilities. In accordance with Charter section 53, a fiscally self-sufficient and self-sustaining Water Utility must be preserved. See Op. S.D. City Atty. 177-182 (1932); Op. S.D. City Atty. 362-363 (1932); Op. S.D. City Atty. 526-531 (1933); Op. S.D. City Atty. 98-100 (1947); Op. S.D. Atty. 23 (1965); Op. S.D. City Atty. 157-165 (1966); Op. S.D. City Atty. 37-40 (1967). Exempting Housing Trust Fund projects from paying capacity charges or charging them a nominal fee threatens this concept if there is no commensurate increase in service charges to make up for the reduction in revenue.

In addition to the restrictions imposed on the Water Utility by Charter Section 53, existing bond covenants have express restrictions on the use of all sewer revenues. Section 6.15 of the Master Installment Purchase Agreement between the City of San Diego and the Public Facilities Financing Authority of the City of San Diego for Series 1993 Sewer Revenue Bonds, dated September 1, 1993, provides:

SECTION 6.14. Collection of Rates and Charges No Free Service. The City will have in effect at all times rules and regulations for the payment of bills for Wastewater Service. . . . The City will not permit any

part of the Wastewater System or any facility thereof to be used or taken advantage of free of charge by any authority, firm or person, or by any public agency (including the United States of America, the State of California and any city, county, district, political subdivision, public authority or agency thereof). [Emphasis added.]

The San Diego Municipal Code requires the payment of capacity charges whenever a new, additional or larger connection is made, or an increase in capacity is provided to a property. The capacity charges pay for the facilities necessary to provide the water and sewer service to the property. Section 6.14 of the bond covenants specifically mandates that the sewer system or any of its facilities shall not be used free of charge by any person. Thus, waiving capacity charges for Housing Trust Fund projects is contrary to the mandates of SDMC sections 64.0140 and 67.72, and existing bond covenants.

### Conclusions

From the foregoing we conclude that Councilmember Vargas' motion to completely exempt, or establish a nominal capacity charge for, Housing Trust Fund projects is of no effect. First, the item was not properly noticed and will not be coming back to Council unless a new City Manager action is initiated to bring it back as a new agenda item. Second, such an exemption or establishment of a nominal charge is contrary to state law, the San Diego Municipal Code, the City Charter and bond covenants.

JOHN W. WITT, City Attorney

By

Kelly J. Salt  
Deputy City Attorney

KJS:pev:400:559x043.2)  
ML-96-40